(3)

NO 09-419

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2009

COMMONWEALTH OF KENTUCKY,
Petitioner

vs

EDDIE CARDINE AND MICHAEL CURRY,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT EDDIE CARDINE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented by Kentucky's certiorari petition is essentially one of state law. Is a state appellate court prohibited from applying a long-standing, adequate and independent state procedural rule permitting review of a double jeopardy claim on appeal when the defendant did not expressly object to the trial judge's *sua sponte* declaration of a mistrial, and, does this Court have jurisdiction to review a purely state law issue when Kentucky did not raise it on appeal?

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OPINIONS BELOW

The Kentucky Supreme Court is Opinion is reported as Cardine v. Commonwealth, 283 S.W.3d 641 (Ky. 2009). Petitioner's Appendix ("Pet. App.") 1a-24a. The Kentucky Supreme Court is Order unanimously and summarily denying the Petition for Rehearing was entered on June 25, 2009. Pet. App. 26a-27a.

JURISDICTION

28 U.S.C. §1257 provides certiorari jurisdiction over federal constitutional issues arising out of a final state court judgment. That jurisdiction does not exist here for two reasons: 1) the merits of the Question Presented by the Commonwealth of Kentucky ("Kentucky") was not fairly presented on direct appeal[1], and 2) the Kentucky Supreme Court's decision rested entirely on adequate and independent state law grounds.

STATEMENT OF THE CASE

Though Respondent Eddie Cardine ("Cardine") does not take issue with the chronological order of events summarizing the state court proceedings in the Commonwealth of Kentucky's ("Kentucky") Statement of the Case, Cardine will supply details that have been omitted by Kentucky, which have a direct bearing on this Court's jurisdiction.

On October 25, 2005, the parties appeared before the trial court for the purpose of selecting a jury to hear Kentucky's evidence concerning the criminal charges filed against the Respondents Eddie Cardine and Michael Curry. The jury was sworn in at

[1] Rule 14.1(g)(i) requires a petitioner, who is requesting review of a state court judgment, to specify when and how the federal claim was raised and passed upon in the state court(s), including specific references to the record. Kentucky has failed to comply with the requirements of this rule in their Statement of the Case.

approximately 5 00 p m and instructed to return the next day On the following morning, Kentucky disclosed a new witness - a man identified only as "Rob " The new witness was not discovered by Kentucky officials, but was identified to the prosecutors that morning by the mother of the young man whose death Cardine and Curry were on trial for causing No one from the prosecutor's office had spoken to Rob or knew Rob's surname at the time the witness's existence was first revealed When Rob was brought into court by authorities, he identified himself as Mr Hebert and told the court that he had no testimony to give in the matter

Before taking a break to allow counsel an opportunity to interview Rob, the trial judge indicated that she was inclined either to exclude the witness's testimony or to grant a continuance Counsel returned to the courtroom about an hour and a half later In addition to interviewing the witness during the break, the trial judge, counsel for Kentucky, and counsel for Curry indicated they had engaged in an off-the-record discussion over lunch concerning objections to the witness Specifically, the discussion focused on whether the witness ought to be excluded or if a 24-hour continuance would be a sufficient remedy Cardine's counsel was not present during the lunchroom discussion

Now on the record, counsel for Curry reiterated his lunchtime objection to the evidence by moving to exclude Mr Hebert's testimony Further, he indicated that if the court denied the motion to exclude, he would move in the alternative for a continuance Cardine's counsel then joined the motion to exclude the witness, on the same grounds In responding to the objections of counsel, Kentucky argued that Rob, whom they had not heard of until that morning, was a "crucial" witness in their case After finding that Rob was important to both the prosecution's case and the defense, the trial judge denied the motion to exclude the witness's testimony The judge then declared a mistrial *sua sponte* At a second trial, both Cardine and Curry were convicted of murder, complicity to attempted murder, and complicity to assault second degree

On direct appeal to the Kentucky Supreme Court, Cardine argued that the erroneous declaration of a mistrial resulted in a second trial being held in violation of his right not to be twice placed in jeopardy The issue being raised in Kentucky's Petition to this Court was not addressed in their Brief to the Kentucky Supreme Court In that pleading, Kentucky touched on preservation only as a matter of state law and only as though it was a preliminary matter of little significance

> The trial court declared a mistrial after appellant argued that he would be prejudiced by the disclosure of a new witness immediately prior to the commencement of proof, that a short continuance would not cure the prejudice and only exclusion **or in the alternative continuance to a new trial date would be proper The court then only granted what he asked for** and it was not an abuse of discretion to find a manifest necessity and declare a mistrial when the court did not have a certain date for the new trial **The claim is otherwise unpreserved and waived by the request for a new trial date**
>
> Respondent's Appendix ("Resp App ") 11a (emphasis added, internal citations omitted)

In its Opinion, the Kentucky Supreme Court rejected Kentucky's assertion that Cardine and Curry **expressly requested a mistrial** by asking for a continuance to a new trial date Petitioner's App 18a -19a Specifically, the Kentucky Supreme Court made a factual finding that when counsel for Cardine and Curry requested a continuance in the alternative to exclusion, counsel were actually seeking a continuance - not a mistrial *Id*[3]

[3] This interpretation of the majority Opinion (as well as Kentucky's argument in its direct appeal brief) is corroborated by the dissenting opinion adopted by two of the six Justices Pet App 24a-25a The dissent wrote as follows "By entering the mistrial, Appellants received the continuance each requested " *Id* In other words, the dissent was persuaded by the Commonwealth's argument that Respondents had expressly requested the mistrial The dissent did not make any findings with regard to waiver or implied consent

The Kentucky Supreme Court nevertheless found that Cardine was not barred, under controlling Kentucky case law interpreting the rules of preservation, from raising his double jeopardy claim on appeal Pet App 19a - 20a Further, the Kentucky Supreme Court found that pursuant to Kentucky's procedural rules, Cardine and Curry were not required to raise an objection upon retrial Pet. App 20a-22a. In short, the court applied Kentucky's long-standing procedural rule permitting review of double jeopardy claims on appeal under its palpable error standard[4] *Id* at 21a

Thereafter, Kentucky filed a Petition for Rehearing in the Kentucky Supreme Court At the tail end of Argument I of its Petition for Rehearing, Kentucky continued to press its previously unsuccessful argument that Cardine's request for a continuance was really an **express request for a mistrial** Kentucky wrote in relevant part

> **The Commonwealth lastly respectfully submits that the court has not fully considered the nature of the continuance requested by both defendants at the time the mistrial was declared in concluding that neither appellant asked for a mistrial.** In its brief, the Commonwealth had argued that the court then only granted appellant what he asked for For the benefit of the court, the Commonwealth has appended a transcription of those proceedings and an examination of the record or the transcription shows that both Cardine and Curry requested continuance of trial and neither asked for a simple continuance **It would not be unreasonable for the trial court to conclude therefrom that both were a request for a new trial which would necessitate a mistrial as opposed to merely a continuance** of the present trial because counsel had clearly distinguished their present request as something more than a continuance
> (emphasis added, internal citations omitted)

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[4] Kentucky Rule of Civil Procedure 61 02 provides "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error "

Additionally, Kentucky asserted for the first time in Argument II of the Petition for Rehearing that the Kentucky Supreme Court "erroneously fail[ed] to consider or misconceive[d] the significant body of case law on why appellant's conduct constituted **implied consent** due to the fact that the defendants did not object to and otherwise acquiesced in the mistrial." To support their new theory of **implied consent**, Kentucky included citation to federal circuit court decisions to support their claim that the Kentucky Supreme Court had failed to consider or misconceived a significant body of case law on **implied consent**. Kentucky was correct in its statement that the court *did not consider* this body of case law, because none of those federal cases were cited in Kentucky's direct appeal brief as a basis for its objection to the court's consideration of Cardine's double jeopardy claim. Indeed, Kentucky cited absolutely no federal case law in its direct appeal brief opposing the relief sought by Cardine as a result of his double jeopardy claim. *See* Resp. App. 11a-13a.

Though the Kentucky Supreme Court's Opinion rendered on January 22, 2009 was split by a 4-2 vote, the court's decision to summarily deny Kentucky's Petition for Rehearing on June 25, 2009 was unanimous. *Compare* Pet. App. 1a-25a *with* Pet. App. 26a-27a.

REASONS FOR DENYING THE WRIT

I THE QUESTION PRESENTED IN THE PETITION WAS NEITHER RAISED ON APPEAL NOR DECIDED BY THE KENTUCKY SUPREME COURT.

Kentucky, in its direct appeal brief, argued that Cardine and Curry had **expressly sought declaration of a mistrial** when they asked for a continuance and for that reason alone had waived their right to appellate review of their double jeopardy claim. The Kentucky Supreme Court thoroughly addressed that argument on state procedural

grounds in its Opinion released in January 2009 Thereafter, in its Petition for Rehearing, Kentucky argued for the first time that the state court should have held that both Cardine's and Curry's failure to object, after the trial court declared a mistrial *sua sponte*, operated as an **implied consent**, thereby waiving any review of their double jeopardy claims under federal case law This issue was never decided by the Kentucky Supreme Court even though it is the sole basis for Kentucky's Petition for a Writ of Certiorari Given the procedural posture of this case, granting certiorari would be inconsistent with this Court's rule that federal claims not raised or addressed below will not be considered *See Howell v Mississippi, 543 U S 440, 443 (2005), Adams v Robertson*, 520 U S 83, 86 (1997), *Yee v City of Escondido*, 503 U S 519, 533 (1992), *Illinois v Gates*, 462 U S 213, 221 (1983), *Bailey v Anderson*, 326 U S 203, 206 (1945)

Aside from the rare and exceptional case, this Court has "adhered to the rule in reviewing state court judgments under 28 U S C § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review" *Adams v Robertson*, 520 U S 83, 86 (1997) The purposes underlying this rule are equally applicable to a "State's failure to have opposed the assertion of a particular federal right, as to a party's failure to have asserted the claim" *Illinois v Gates*, 462 U.S 213, 221 (1983) Specifically, the purposes underlying the rule are intended to provide a measure of assurance that (1) matters argued in this Court will arrive with an adequate record upon which to consider the claim, (2) the proper respect between our dual court system is observed by permitting state officials the first opportunity to consider and address the constitutional question, and (3) state courts will be permitted to rest their decisions on

adequate and independent state grounds where appropriate *Id*, *see also Webb v Webb*, 451 U S 493, 500 (1981)

As will be argued at greater length in Section II below, the Kentucky Supreme Court reviewed Cardine's double jeopardy claim under a long-standing state procedural rule regulating preservation in state courts Thus, accepting certiorari in this case would lead to the precise result the rule was intended to prevent a disruption of the balance between state and federal courts raising serious concerns over comity

When the Opinion of the highest state court is silent on a federal constitutional question that has been pressed on review to this Court, the burden to show that the federal question was properly presented to the state court rests with the Petitioner *See Adams v Robertson*, 520 U S 83, 86-87 (1997) Kentucky has failed to meet that burden in this case because they have not previously and cannot now cite to specific references in their direct appeal brief wherein the issue of **implied consent** was raised *See* Resp App 1a-19a Kentucky's failure to provide those citations in its Petition violates this Court's Rule 14 1(g)(i)

Simply, Kentucky made no attempt to argue any federal-law-based-objection in response to Cardine's request for appellate review of his double jeopardy claim in the state court Though the current Petition is very specific, Kentucky never argued in its direct appeal brief that by failing to object, Cardine and Curry had **impliedly consented** to the *sua sponte* declaration of a mistrial Instead, Kentucky asserted that the request for a continuance (in the alternative to exclusion of the witness) should not have been taken literally as a request for a continuance Rather, it was correctly interpreted by the trial court as an **express request for a mistrial** The Kentucky Supreme Court rejected

Kentucky's objection to review of Cardine's double jeopardy claim and made the following finding of fact in their January 2009 Opinion

> [N]either Appellant asked for a mistrial Appellants requested the alternative relief described above exclusion of the new witness or continuance to another date A mistrial is not a substitute for a continuance, which the Commonwealth seems to imply, because it excuses the current jury from the case, whereas a continuance postpones the trial but keeps the same jury

Pet App 18a Nowhere in its direct appeal brief did Kentucky object to Cardine's double jeopardy claim by asserting a specific federal claim based upon an allegation of **implied consent** to the mistrial Accordingly, this Court should apply the rule and deny certiorari here, where Kentucky has failed to properly raise the same objection in the state court proceedings as it has set forth in its current Petition

Moreover, the Kentucky Supreme Court did not pass upon the question now presented in this Court Even though Kentucky eventually included a federal-law-based-objection in its Petition for Rehearing, the Kentucky Supreme Court did not decide that issue Kentucky Rule of Civil Procedure, Rule 76 32(1)(b) [6] provides in relevant part

> (b) Except in extraordinary cases when justice demands it, **a petition for rehearing shall be limited to consideration of the issues argued on the appeal** and will be granted only when it appears that the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or law applicable thereto.

[6] Kentucky's Civil Rules of Procedure are applicable to appeals from criminal convictions pursuant to RCr 13 04, which provides for the application of civil rules where not superseded or inconsistent with criminal rules

CR 76 32(1)(b)(emphasis added) Thus, Kentucky's attempt to present the federal issue for the first time in a rehearing petition is insufficient to preserve the claim for this Court's review, unless the Kentucky Supreme Court had granted rehearing and addressed the issue It did not Pet App 26a-27a

While Kentucky stated correctly in its Petition for Rehearing that the Kentucky Supreme Court did not consider[7] a federal-law-based-objection in their Opinion, the failure to consider was not erroneous There was absolutely no federal argument or law presented to the Kentucky Supreme Court on this issue in Kentucky's direct appeal brief *See* Resp App 11a-13a Thus, Kentucky's attempt to raise this issue for the first time in its Petition for Rehearing was contrary to Kentucky's court rules and procedures *See* CR 76 32(b), *Reed v Reed*, 457 S W 2d 4, 7 fn 1 (Ky 1970)[8] And the state court's denial of that Petition for Rehearing was not an expression of its Opinion on the merits of the Commonwealth's newly presented federal-law-based-objection *Cf Commonwealth v Ledger*, 955 S W 2d 539, 542-43 (KY App 1997)(rejecting appellant's claim that the Kentucky Supreme Court's denial of Petition for Rehearing pursuant to CR 76 32(1)(c) addressed the matter of attorney's fees on the merits, since that issue could not have been considered on rehearing when it was not a "matter in issue" on appeal)

Since Kentucky failed to raise its federal-law-based-objection for the Kentucky Supreme Court's review of Cardine's double jeopardy claim prior to the issuance of the

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[7] Kentucky asserted in its Petition for Rehearing filed pursuant to CR 76 32(1)(b) that the Kentucky Supreme Court "erroneously fail[ed] to consider or misconceive[d] the significant body of case law "

[8] Though the *Reed* court was interpreting RCA 1 350(b), the 1969 version of the rule referenced in that case contained exactly the same language as is set forth in today's version of the court rule governing Petitions for Rehearing, which can be found at CR 76 32(1)(b) *Compare* RCA 1 350(b) effective September 1, 1968 *with* CR 76 32(1)(b), effective January 1, 1978

state court's Opinion on the merits, certiorari must be denied pursuant to the long-standing rule that objections to federally based rights not presented or decided by the state court are inappropriate for review in this Court *See Illinois v Gates*, 462 U S 213, 221 (1983)

II. THIS COURT LACKS JURISDICTION BECAUSE THIS CASE WAS DECIDED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

This Court lacks jurisdiction to review a final judgment from the Kentucky Supreme Court that was decided on independent and adequate state law grounds *See Coleman v Thompson*, 501 U S 722, 729 (1991) The question Kentucky seeks to have this Court resolve in its favor is "[w]hether the double jeopardy clause bars the retrial of defendant after the trial court *sua sponte* declares a mistrial absent manifest necessity and the defendant does not object prior to the actual discharge of the jury " However, the appellate issue raised in the state court was whether Cardine's double jeopardy claim could be reviewed on appeal absent an express objection after the trial court *sua sponte* declared a mistrial The Kentucky Supreme Court's ruling was grounded entirely in a long-standing state court procedural rule Kentucky never argued that review of this issue on appeal was barred by federal law and the Kentucky Supreme Court holding was based on independent and adequate state law grounds

In its direct appeal brief, Kentucky's argument in opposition to Cardine's double jeopardy claim was that Cardine had **expressly requested a mistrial** by asking for a continuance (in the alternative to exclusion of the newly identified witness), hence, Cardine's double jeopardy claim could not be reviewed on appeal *See* Resp App 11a-13a Citing absolutely no state or federal authority for its argument, Kentucky made the additional vague claim that review on appeal was unwarranted because "[t]he claim is otherwise unpreserved and waived by the request for a new trial date " *Id* In its

Opinion, the Kentucky Supreme Court held as a factual finding that Cardine and Curry had not **expressly requested a mistrial** *See* Pet App 18a

The Kentucky Supreme Court went on to hold that under the state's criminal rules of procedure and controlling state case law, Cardine need not object to the *sua sponte* declaration of a mistrial in order to have his double jeopardy claim reviewed on appeal *See id* at 19a-20a Finally, the state court held that Cardine's double jeopardy claim was properly before the court for appellate review, even though he had not objected at the time of retrial *See* Pet App 21a-22a Again, the Kentucky Supreme Court cited a longstanding and repeatedly upheld state court principle that appellate review of double jeopardy claims would be exercised, even in the absence of an objection by the defendant *See id*, *citing Terry v Commonwealth*, 253 S W 3d 466, 470 (Ky 2007), *Beaty v Commonwealth*, 953 S W 3d 196, 210 (Ky 2003), *Grundy v Commonwealth*, 25 S W 3rd 76, 85 (Ky 2000), *Gunter v Commonwealth*, 576 S W 2d 518, 522 (Ky 1978), *Sherley v Commonwealth*, 558 S W 2d 615, 618 (Ky 1977)

Kentucky asks this Court to ignore the state court's application of its own procedural rules and find that the Cardine's double jeopardy claim is barred Granting certiorari in these circumstances would be contrary to the principles adhered to by this Court "from the time of its foundation" that "judgments of state courts that rest on adequate and independent state grounds" will not be reviewed *Herb v Picairn*, 324 U S 117, 125 (1945) This principle has been enforced uniformly based upon both substantive and procedural state law grounds *See Coleman v Thompson*, 501 U S 722, 729 (1991) The Kentucky Supreme Court made clear that a long standing state procedural rule provided the authority to review Cardine's double jeopardy claim on appeal This Court should not upset a state court judgment that rests on independent and adequate state law grounds – particularly when as here, Kentucky failed to assert any federal basis for its claim in the state court proceedings

III. THERE IS NO ACTUAL CONFLICT BETWEEN THE CARDINE OPINION AND THOSE OF OTHER STATE COURTS OF LAST RESORT OR FEDERAL COURTS OF APPEAL.

Kentucky's petition for a writ of certiorari should be denied because no "compelling reason" to grant that petition has been advanced *See* Supreme Court Rule 10 Kentucky's claim that there is a conflict between the opinion of the Supreme Court of Kentucky and decisions of federal courts of appeal and state courts of last resort is illusory In fact, all of the courts Kentucky cites articulate and follow the same legal principles They simply reach different conclusions about whether a retrial is barred by the double jeopardy clause based on the specific circumstances of the cases before them Cardine's case does not merit a grant of certiorari

Advancing its claim that a conflict among the courts warrants a grant of certiorari, Kentucky summarizes the law concerning when the government can retry a defendant following the declaration of a mistrial without offending the double jeopardy clause, citing several key cases decided by this Court *United States v Perez*, 22 U S 579, 580 (1824), *United States v Dinitz*, 424 U S 600, 607-610 (1976), *Arizona v Washington*, 434 U S 497, 505 (1978), and *Oregon v Kennedy*, 456 U S 667, 676 (1982) *See* Petition at 6 In *Perez* this Court first held that a mistrial declared without the consent of the defendant does not present a double jeopardy bar to a second trial if there was a "manifest necessity" for the ruling This Court held in *Dinitz* that a mistrial declared on motion of defense counsel did not bar retrial unless the mistrial motion was induced by bad faith conduct by the judge or prosecutor 424 U S at 611-612 In *Arizona v Washington* this Court held that a mistrial declared because of misconduct by the defense

did not bar retrial on double jeopardy grounds, finding there was manifest necessity for the ruling although the trial court had not specifically made such a finding 434 U S at 515-517 In *Oregon v Kennedy* this Court held that a mistrial declared on motion of the defendant after the prosecutor called him a crook did not bar retrial on double jeopardy grounds when the trial court specifically found the prosecutor did not intend to provoke a mistrial 456 U S at 671-679

Kentucky cites *Dinitz*, a case where defense counsel moved for a mistrial, for the principle that a defendant who consents to a mistrial may be retried even if there was no manifest necessity for declaring the mistrial *See* Petition at 6-7 Kentucky then frames the issue in this case as "whether a defendant consents to a mistrial by failing to object after the trial court *sua sponte* declares one" *See* Petition at 7 Kentucky asserts that numerous other courts have answered that question affirmatively and that the Kentucky Supreme Court's contrary conclusion warrants this Court's review[9] *See* Petition at 7-14

In fact, there is no actual conflict between the Kentucky Supreme Court's opinion and the decisions of the federal courts of appeal or another state court of last resort The Supreme Court of Kentucky properly articulated the law concerning double jeopardy claims following a *sua sponte* mistrial declaration and then applied the law consistently with Kentucky's long-standing rule permitting review of double jeopardy claims even in the absence of an objection in the trial court, noting that Kentucky has held for more than thirty (30) years that lack of preservation "should not result in permitting a double jeopardy conviction to stand" *Dixon v Commonwealth*, 263 S W 3d 583 (Ky 2008),

[9] Cardine asserts that Kentucky did not raise this "implied consent" issue in the Kentucky Supreme Court and that court did not reach the issue *See* Argument I However, for the purpose of this argument, Cardine will assume the court found a lack of implied consent

quoting *Sherley v Commonwealth*, 558 S W 2d 615, 618 (Ky 1977), *overruled on other grounds* by *Dixon v Commonwealth, supra*

Kentucky cites decisions by the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth Circuit Courts of Appeal as well as decisions from New Hampshire, Florida[10], Massachusetts and Missouri state courts and contends that there are several different standards being followed but that only the New Hampshire Supreme Court and the Florida Court of Appeals have agreed with the Kentucky Supreme Court that failure to object following *sua sponte* declaration of a mistrial does not amount to consent *See* Petition at 8-13 In fact, all of those courts, including the Kentucky Supreme Court, have properly articulated the rules concerning when the double jeopardy clause bars a retrial following a *sua sponte* mistrial declaration and simply applied those rules differently based on the particular circumstances of the cases before them There is no actual conflict warranting review

Kentucky first cites *United States v Pietro*, 936 F 2d 6 (1st Cir 1991) and *Camden v Circuit Court of Second Judicial Circuit, Crawford County, Ill* , 892 F 2d 610 (7th Cir 1989), as support for the position that "a defendant does have the opportunity to object following a court's *sua sponte* mistrial declaration and that failure to object constitutes consent" *See* Petition at 8-9 The *Camden* court cited *United Sates v Perez*, 22 U S 579, *Arizona v Washington*, 434 U S 497, *United States v Dinitz*, 424 U S 600,

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[10] Kentucky cites *State v Bertrand*, 587 A 2d 1219, 1225 (N H 1991) and *Joseph v State*, 988 So 2d 133, 135 (Fl App Ct 2008) as holding that "a defendant's failure to object following the *sua sponte* declaration of a mistrial does not amount to consent" *See* Petition at 8 *Joseph* is not a decision of a state court of last resort, and the appellate court relies almost exclusively on state cases *Bertrand* involves a court's *sua sponte* mistrial declaration prompted by repeated misconduct by the prosecutor, with the defense requesting dismissal rather than a mistrial The New Hampshire Supreme Court cited *Perez, supra, Dinitz, supra* and *Arizona v Washington, supra*, analyzed the circumstances surrounding the declaration and held that the defense did not consent to the mistrial 587 A 2d at 1224-1225

and *Oregon v Kennedy*, 456 U S 667 and stated that the double jeopardy clause would only permit retrial "if defense counsel's conduct constituted implied consent or if the mistrial decision was supported by manifest necessity" since Camden neither requested nor expressly consented to the mistrial 892 F 2d at 614 Analyzing the circumstances surrounding the *sua sponte* declaration of a mistrial, the Seventh Circuit found implied consent, referring to "the unique circumstances of this case" *Id* at 617-618 Citing *Camden* and the same opinions of this Court on which the *Camden* court relied, the First Circuit in *United States v Pietro*, articulated the same standard for consent the Seventh Circuit had outlined in *Camden*, analyzed the circumstances surrounding the *sua sponte* mistrial declaration and found implied consent 936 F 2d at 8-12[11]

Kentucky next cites *United States v Ham*, 58 F 3d 78 (4th Cir 1995), *United States v Puelo*, 817 F 2d 702 (11th Cir 1987), and *Pellegrine v Commonwealth*, 844 N E 2d 608 (Mass 2006) as applying "a similarly strict standard" concerning the necessity of objecting if there is an opportunity to do so lest consent be implied *See* Petition at 10 However, *United States v Ham*, does not address a Double Jeopardy Clause claim involving a mistrial *See* 58 F 3d at 83-84 The issue before the appellate court was the failure of the lower court to try a discrete issue before the jury, and the Fourth Circuit borrowed the double jeopardy rules that apply when mistrials occur, citing *Camden*, *Pietro* and other federal cases *Id* Based on the facts surrounding the failure to submit the issue to the jury, the court found implied consent by the defendant *Id* at 84

[11] The First Circuit clearly analyzes these issues on a case by case basis, focused on the facts surrounding the claim *See United States v Toribio-Lugo*, 376 F 3d 33 (1st Cir 2004) where the First Circuit reversed the lower court and held a retrial was barred on double jeopardy grounds when the court had declared a mistrial *sua sponte* and there was no objection by the defendant

United States v Puelo involves declaration of a mistrial based on a jury being unable to reach a verdict after the trial judge announced his intention to take that action if further deliberations were not fruitful 817 F 2d at 705-706 Thus, *Puelo* does not involve a *sua sponte* mistrial declaration And, once again, the decision was based on the particular facts of the case Neither *Ham* nor *Puelo* even addressed the issue which was decided by the Kentucky Supreme Court *Pellegrine v Commonwealth*, 844 N E 2d 608 (Mass 2006) involves a trial court granting a mistrial on its own initiative and then determining a second trial was not barred by the Double Jeopardy Clause based on the facts of the case No different rule than the one articulated in *Camden* and *DiPietro* is espoused

Continuing with its conflicting standards claim, Kentucky describes the Second, Fourth and Sixth Circuits as applying a "totality of circumstances" test to determine whether a defendant consented to a mistrial by failing to object, citing *Maula v Freckleton*, 972 F 2d 27 (2nd Cir 1992), *United States v Nichols*, 977 F 2d 972 (5th Cir 1992) and *United States v Gantley*, 172 F 3d 422 (6th Cir 1999) as well as *State v Tolliver*, 839 S W 2d 296 (Mo 1992) *See* Petition at 10-11. Like *United States v Ham*, 58 F 3d 78, *Maula v Freckleton*, a *per curiam* opinion, does not address a double jeopardy clause issue involving a mistrial 972 F 2d at 28-29 The lower court failed to submit certain charges to the jury, and the Second Circuit borrowed the double jeopardy rules that apply when mistrials occur and decided consent to non-submission occurred based on the circumstances *Id* *United States v Nichols*, 977 F 2d 972, also a *per curiam* opinion, does address a *sua sponte* mistrial declaration and the Court found implied consent to the mistrial based on the circumstances, following the same legal

principles articulated by the other federal courts of appeal which have been previously discussed *State v Tolliver*, 839 S W.2d 296, likewise involves *sua sponte* declaration of a mistrial, and the Court cites *Camden, Puelo, DiPietro* and the usual four opinions of this Court before concluding that the defendant impliedly consented to the mistrial

In *United States v Gantley*, 172 F 3d 422 the Sixth Circuit addressed a double jeopardy clause claim based on a court's declaration of a mistrial precipitated by the defendant's misconduct *Id* at 425-426 That Court stated "this Court's test for whether a defendant has impliedly consented to a mistrial is not materially different from the test used by other Circuits" *Id* at 429 [12] The Court further noted that "this Circuit simply insists on an especially careful examination of the totality of the circumstances, to ensure a defendant's consent is not implied when there is a substantial question of whether the defendant did, in fact, consent" *Id* at 428-429 The Court then held the defendant had given implied consent to the mistrial *Id* at 429

Kentucky next cites *Love v Morton*, 112 F 3d 131 (3rd Cir 1997) to support a court's looking "to specific factors that illustrate consent," and *United States v You*, 382 F 3d 958, 964-965 (9th Cir 2004) to indicate implied consent "only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order" (Petition at 11) In *Love* the Third Circuit cited the usual four opinions of this Court as well as *DiPietro, Camden, Puleo, Nichols* and *Ham*, all *supra*, and then refused to infer consent to the *sua sponte* mistrial declaration based on the circumstances of the case 112 F 3d at 136-139 The Ninth Circuit in *You*, relying on its own precedents, reviewed the circumstances surrounding the mistrial ruling, including counsel for the

[12] In *United States v Ham*, 58 F 3d at 83-84 and fn 3, the Fourth Circuit cited *United States v DiPietro*, 58 F 3d at 936 F 2d at 10-11, and noted that the First Circuit "has concluded that the Sixth Circuit has actually not set a different standard"

defendant declining the court's invitation to "make a record" concerning that ruling, and found implicit consent to the mistrial 382 F 3d at 962, 964-965

Kentucky boldly claims that "had the Kentucky Supreme Court analyzed this case using any of the standards regarding implied consent applied in the federal circuits, the court would have upheld the convictions" *See* Petition at 13 First, the federal courts of appeal and the state courts of last resort are all using the same standard As outlined above, all federal courts of appeal cite to the same core opinions of this Court and then simply analyze whether there was implied consent to a *sua sponte* mistrial declaration based on the particular circumstances surrounding the declaration Likewise, the Kentucky Supreme Court cited *Perez*, *Dinitz* and *Arizona v Washington* and articulated the proper rule of law

> "Once jeopardy attaches, prosecution of a defendant before a jury other than the original jury or contemporaneously-impaneled alternates is barred unless 1) there is a 'manifest necessity' for a mistrial or 2) the defendant either requests or consents to a mistrial "
> Pet App at 9a, quoting *Commonwealth v Ray*, 982 S W 2d 671, 673 (Ky App 1998)

The Kentucky Supreme Court then analyzed the circumstances surrounding the trial court's grant of a mistrial, including Cardine's request for exclusion of the late-discovered witness or a continuance, cited to RCr 9 22 concerning a party's failure to object when there is no opportunity to do so not thereafter prejudicing the party, and found Respondents Cardine and Curry "did not consent to the trial court's declaration of a mistrial " *See* Pet App at 18a-20a The Kentucky Supreme Court properly applied the same rule of law applied by the courts in the cases cited by Kentucky which supposedly conflict with Kentucky Supreme Court's opinion In fact, the Kentucky

Court specifically rejected the Kentucky's assertion that there was **express consent** to the declaration of a mistrial in this case And the Court declined to pass on the "implied consent" argument set forth in the Petition for Rehearing Thus, there is no actual conflict created by the Kentucky Supreme Court's opinion here

This Court has dismissed writs of certiorari as improvidently granted if it discovers that, on further examination, there was not a conflict on an important legal issue which warranted the Court's review *See Wisconsin Electric Company v Dumore Company*, 282 U S 813 (1931) In *Layne & Bowler Corporation v Western Well Works*, 261 U S 387, 392-393 (1923) this Court stated

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals

No actual conflict exists among the federal courts of appeal and state courts of last resort cited by Kentucky Instead, all of those courts articulate the same underlying legal rule and then reach different outcomes based on the particular circumstances of the cases before them The petition for a writ of certiorari should be denied

CONCLUSION

The Petition for Writ of Certiorari should be denied

Respectfully submitted,

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